(7)

No. 89-1836

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

DOMINIC P. GENTILE,
Petitioner,

v.

STATE BAR OF NEVADA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEVADA SUPREME COURT

BRIEF OF AMICUS CURIAE

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INTEREST OF THE AMICUS CURIAE

Amicus, Nevada Attorneys for Criminal Justice, is a non-profit, voluntary association of those individuals, mainly criminal defense attorneys, who have an interest in the fair administration of justice in the country in general, and Nevada in particular. Petitioner Gentile is a founding member of NACJ. Amicus filed briefs opposing the disciplinary charges brought against Mr. Gentile with both the Southern Nevada Disciplinary Board, which originally heard the Petitioner's case, and with the Nevada Supreme Court which issued the final Opinion.

Amicus presents this brief for the Court's consideration because of real concerns that the State of Nevada has embarked upon a course which will end in the complete censorship of citizens who happened to be attorneys. The NACJ believes that it is in the best interest of the public, individual defendants, and the justice system as a whole, that free and full discourse be allowed on matters of great public importance. Such matters would include, at a minimum, the speech at issue here—discussion of police theft of drugs and money and the attempt to convict an innocent man of those police crimes.

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PREFACE

Those who won our independence believed that the final end of the state was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed. *Whitney v. California*, 274 U.S. 357, 375-76, 71 L.Ed. 1095, 1105-06, 47 S.Ct. 641 (1927)(Brandeis, J., concurring)

STATEMENT OF FACTS

Sometime prior to January, 1987, officers with the Las Vegas Metropolitan Police Department (hereinafter "Metro"), as part of a purported narcotics "sting" operation, allegedly stored $1,000,000 worth of cocaine and $300,000 in blank travelers checks in a safe deposit box secretly rented by Metro at the Western Vault Corp., a private vault and storage facility owned by one Grady Sanders. On January 31, 1987, Metro discovered that the cocaine and travelers checks had been stolen. (See gen., App., Newspaper Articles)1

Two Metro officers had keys and access to the box. These officers were subsequently "cleared" by their own department of any involvement in the theft from the Western Vault. This public announcement of the officers' non-involvement came after the officers took, and purportedly passed, a polygraph examination conducted by Ray Slaughter, a local private detective and polygraph expert. No public explanation was provided as to why the officers were not required to submit to a polygraph examination conducted by Metro experts. After clearing the officers of any involvement in the theft of cocaine and checks, the polygraph operator, Ray Slaughter, was himself arrested by the FBI on charges stemming from the sale of cocaine. (See, gen. App., Newspaper Articles)

On February 5, 1988, Mr. Sanders was indicted on eleven counts charging grand larceny, trafficking in controlled substances, and racketeering, all of which generally alleged that Mr. Sanders was responsible for the theft of Metro's drugs and traveller's checks. Petitioner was retained to represent Mr. Sanders against those serious charges. Mr. Gentile held a press conference on February 5, 1988 and generally stated that his client was innocent and that the guilty party was most likely one of the police officers who had a key to the storage box. At that time, trial was scheduled for six months in the future. (App., Nevada Supreme Court Opinion, pg. 2)

1At the time this brief was finalized, the Appendix agreed upon by the parties had not been received from the printers and Amicus did not have access to indexing for that Appendix. Therefore, references in this brief will be to specific documents in the Appendix and page numbers within the particular document where appropriate.

guilty party was most likely one of the police officers who had a key to the storage box. At that time, trial was scheduled for six months in the future. (App., Nevada Supreme Court Opinion, pg. 2)

After a jury trial, Mr. Sanders was found innocent of all charges. In fact, the jury foreman subsequently stated that the jury felt that the individual who actually stole the drugs and money from the vault was one of the Metro officers who had had a key to the storage box. (App., Transcript of State Bar Proceedings, pg. 74:3-10) After the jury found that Mr. Sanders was not the person who had taken Metro's cocaine and checks, disciplinary charges were initiated by the State Bar against Mr. Sanders' attorney, Petitioner Gentile, at the request of Nevada Supreme Court Justice Cliff Young (App., Letter from J. Young). The State Bar Complaint alleged that Mr. Gentile had violated the provisions of Supreme Court Rule 177. Appellant was charged with making statements at the February 5, 1988 press conference regarding the Sanders case which "were of a nature which he knew, or reasonably should have known, would have a substantial likelihood of materially prejudicing the adjudicative proceedings in the case of the State of Nevada v. Grady Sanders." (App., Complaint, pg. 9:1- 11)

The State Bar's evidentiary presentation at the hearing on the disciplinary charges consisted solely of four exhibits: the complaint, a videotape of the press conference, and two letters from Mr. Gentile. No witnesses were called by the Bar. No evidence was presented concerning the effect Mr. Gentile's statements had on the trial itself. The Bar apparently relied on the presumption of misconduct established by Rule 177(2). (App., Designation Of Witnesses And Summary Of Evidence) Based upon those four exhibits, the Southern Nevada Disciplinary Board found that Mr. Gentile's statements violated the strictures of Rule 177 and recommended that Mr. Gentile be issued a private reprimand. (App., Findings and Recommendation, pg. 4) As to the constitutional issues presented by Mr. Gentile, the Board stated, *in toto*, that "SCR 177 does not violate either the United States or the Nevada Constitutions". (*Id.* at 4:9-10)

The Nevada Supreme Court upheld the State Bar's decision. The Supreme Court recognized that "the evidence demonstrates that there

was no actual prejudice in this case" (App., Nevada Supreme Court Opinion, pg. 3-4). However, the Supreme Court held that:

> The fact that these comments were timed to have maximum impact and related to the character, credibility, reputation or criminal record of the police detective and other potential witnesses establishes by clear and convincing evidence the substantial likelihood of material prejudice to the adjudication of the accused's criminal proceedings. *Id.* at 4.

The Nevada Supreme Court, as did the Disciplinary Bar, gave brief attention to the constitutional issues presented by the Petitioner and this Amicus. "We also reject appellant's constitutional challenges as lacking merit under either federal or Nevada constitutions." (Id., pg. 4.)

ARGUMENT

I. THE STATE BAR'S APPLICATION OF RULE 177 TO THE SPEECH AT ISSUE VIOLATES MULTIPLE GUARANTEES PROSCRIBED BY THE UNITED STATES CONSTITUTION.

The Nevada Supreme Court has adopted, with certain amendments, the ABA's Model Rules of Professional Conduct ("Model Rules"). Included in the ABA's Model Rules is Rule 3.6 which pertains to Trial Publicity. Rule 3.6 was adopted verbatim and became Rule 177 of the Nevada Rules of Professional Conduct.

There are at least four (4) major ethical guidelines adopted nationwide that purport to control the type of statements that can be made by counsel during the pendency of a criminal case: (l) ABA Code in DR 7-107; (2) Model Rule 3.6; (3) ABA Standards for Criminal Justice; and (4) ATLA Code. The restrictions each of these four attempt to make on the exercise of free speech by defense counsel is substantially different. Criminal Defense Ethics, Chapter 10, pgs. 10-1-8.

The ABA Code is the most restrictive and flatly prohibits various sorts of statements from being made during litigation. The Model Rules, which, as set forth above, have been adopted by the Nevada Supreme Court, create a supposedly rebuttable presumption that certain pretrial statements create "a substantial likelihood of materially prejudicing an adjudicative proceeding." The ABA Standards of Criminal Justice, Fair Trial and Free Press Standards prohibit only those extrajudicial statements which "pose a clear and present danger to the fairness of the trial". The ATLA Code goes the farthest in protecting First Amendment rights and concludes that no extrajudicial statements made by criminal defense counsel should ever be viewed as ethically impermissible.

Amicus asserts that Rule 177 is unconstitutional on numerous grounds. Furthermore, even assuming the constitutionality of Rule 177, Amicus asserts that the Bar failed to prove by clear and convincing evidence that the Appellant's communications presented a clear and present danger to the administration of justice.

A. PETITIONER'S RIGHT TO COMMENT ON MATTERS OF GREAT PUBLIC IMPORTANCE WAS VIOLATED BY THE APPLICATION OF RULE 177.

Rule 177 prohibits an attorney from making extrajudicial statements that the attorney would expect to be disseminated by the press if "the lawyer knows or reasonably should know that [the extrajudicial statement] will have a substantial likelihood of materially prejudicing an adjudicative proceeding." (Emphasis added) The Rule further sets up a rebuttable presumption that certain enumerated statements "ordinarily" will materially prejudice a case. The Rule makes no distinction between speech which involves political or public integrity implications and that which merely involves the merits of the particular litigation. Amicus asserts that the application of Rule 177 to the Petitioner's speech violates Mr. Gentile's freedom of speech for the reasons set forth below.

1. THE SUBJECT SPEECH DID NOT PRESENT A CLEAR AND PRESENT DANGER TO THE SUBSEQUENT TRIAL.

Freedom of speech has always been the most cherished of rights guaranteed under the Bill of Rights. The First Amendment is not only first in number but first in importance, for from the rights secured by that Amendment, all other rights flow and are protected. The Fourteenth Amendment guarantees that the rights prescribed by the First Amendment will be enjoyed by all citizens of this Nation. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 500- 501, 72 S.Ct. 777, 779—80, 96 L.Ed. 1098 (1952).

The First Amendment, and the Freedom of Speech Clause contained therein, has always been considered "indispensable to the discovery and spread of political truth," *Whitney v. California*, 247 U.S. 357, 375, 47 S.Ct. 641, 648, 71 L.Ed. 1095 (1927) (Brandeis, J., concurring). Furthermore, this Court has repeatedly emphasized that the First Amendment "embraces at least the liberty to discuss publicly and truthfully all matters of public concern. . . ." *Thronhill v. Alabama*, 310

U.S. 88, 101-102, 60 S.Ct. 736, 85 L.Ed. 1093 (1940).

Beginning with *Bridges v. California*, 314 U.S. 252, 263, 62 S.Ct. 190, 194, 86 L.Ed. 192 (1941), this Court has demonstrated a preference for free expression and a requirement that any interference with that expression be based on a real and substantial danger to judicial functions. In *Bridges*, the Court addressed the constitutional ability of courts to punish comment and criticisms concerning litigation pending before those courts. This Court stressed that the substantive evils presented must be "extremely serious and the degree of imminence extremely high before utterances can be punished." 314 U.S. 263, 62 S.Ct. 194.

The Court, in *Pennekamp v. Florida*, 328 U.S. 331, 66 S.Ct. 1029, 90 L.Ed. 1295 (1946), again faced questions concerning the propriety of a contempt citation against the press for comments printed concerning pending litigation. The Court reasoned that regardless of the phrase used to describe the analytical process utilized, e.g., "clear and present", "grave and substantial", "real and substantial", the decision as to whether a particular comment may be sanction depended on the balance between the importance of the communications and the State's interest in the fair administration of justice. 328 U.S. 336, 66 S.Ct. 1032.

The Court in *Pennekamp* recognized the important function free speech concerning judicial affairs plays in our democratic system. "Free discussion of the problems of society is a cardinal principle of Americanism— a principle which all are zealots to preserve. Discussion that follows the termination of a case may be inadequate to emphasize the danger to public welfare of supposedly wrongful judicial conduct." 328 U.S. 346, 66 S.Ct. 1037. In cases where there is a question as to where the balance tips, free speech should prevail. 328 U.S. 347, 66 S.Ct. 1037.

Similarly, the Court in *Craig v. Harney*, 331 U.S. 367, 376, 67 S.Ct. 1249, 1255, 91 L.Ed. 1546 (1947) reversed a contempt citation issued against the press for comments published concerning a pending forcible detainer case. The Court noted that in *Bridges* and *Pennekamp*, a finding of a clear and present danger to the administration of justice had been required in order to sanction presumably free speech. 331 U.S. 372-73, 67 S.Ct. 1253. The Court reversed the contempt citation and held that despite the vehemence of the subject editorials, there was no

real danger presented that the editorials would affect the trial judge's handling of the litigation.

The restrictive holdings in *Bridges, Pennekamp*, and *Craig* were repeated again in *Wood* v. *Georgia*, 370 U.S. 375, 82 S.Ct. 1364, 8 L.Ed.2d 569 (1962), which addressed the propriety of a contempt citation issued against an elected sheriff based upon the sheriff's publication and deliverance to a grand jury of statements criticizing the focus of the grand jury's investigation. The question was whether the sheriff's communications threatened the fair administration of justice. 370 U.S. 376, 82 S.Ct. 572. The Court reversed the contempt citation and reaffirmed the appropriateness of the "clear and present danger" test in determining whether contempt for out-of-court statements concerning pending litigation is constitutionally permissible.

In *Nebraska Press Assn.* v. *Stuart*, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976), the trial court had issued a gag order prohibiting the press from reporting on certain matters until a jury was impaneled. This Court reversed the restrictions on pretrial publicity. The Court found instructive prior cases pertaining to alleged violations of the sixth Amendment guarantee of trial by an impartial jury. Initially, the Court noted that "[i]n the overwhelming majority of criminal trials, pretrial publicity presents few unmanageable threats to this important right." 427 U.S. 551, 96 S.Ct. 2799. The lesson that was gleaned from the Sixth Amendment cases reviewed was that even massive, negative pretrial publicity does not necessarily lead to an unfair trial. "Taken together, these cases demonstrate that pretrial publicity— even pervasive, adverse publicity— does not inevitably lead to an unfair trial.n 427 U.S. 552, 96 S.Ct. 2800.

The Court emphasized that what was critical in avoiding any prejudicial impact on the trial was the "measures a judge takes or fails to take to mitigate the effects of pretrial publicity". 427 U.S. 555, 96 S.Ct. 2801.

The Court found that First Amendment prior restraint cases were also relevant. After reviewing the holdings in *Near v. Minnesota ex rel.*, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931), *Organization for a Better Austin v. Reefe*, 402 U.S. 415, 91 S.Ct. 1575, 29 L.Ed.2d 1 (1971), and *New York Times Co. v. United States*, 403 U.S. 713, 91 S.Ct. 2140,

29 L.Ed.2d 822 (1971), the Court noted that the main consideration in those cases was protection of the rights afforded by the First Amendment. "The thread running through all these cases is that prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." 417 U.S. 560, 96 S.Ct. 2803.

In reversing the gag order the Court noted that there were other, less constitutionally intrusive, methods available to ensure a fair trial. Tools such as a change in venue, postponement of the trial, searching voir dire, and emphatic jury instruction are all available to avoid actual prejudice at trial. 427 U.S. 564, 96 S.Ct. 2805.

Subsequently, this Court explained in *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 844-845, 98 S.Ct. 1535, 1544, 56 L.Ed.2d 1 (1978) that in free speech cases the " 'working principle' " that has emerged is that " 'the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished.' " Id. at 435 U.S. 843, 98 S.Ct. 1544, quoting from *Bridges v. California*, 314 U.S. 252, 263, 62 S.Ct. 190, 194, 86 L.Ed. 192 (1941). As stated in *Craig v. Harney*, supra, 331 U.S. 376, 67 S.Ct. 1255, and quoted with approval in *Landmark*, 435 U.S. 843, 98 S.Ct. 1544, the substantive danger sought to be avoided "must not be remote or even probable; it must immediately imperil."

In *Landmark*, the Court indicated its belief that the "clear-and-present-danger test" espoused by Mr. Justice Holmes was never intended to established a technical and static test. See, *Pennekamp*, 328 U.S. 351-52, 66 S.Ct. 1040.(Frankfurter, concurring) The Court indicated that the purpose behind the phrase was to allow "a court to make its own inquiry into the imminence and magnitude of the danger said to flow from the particular utterance and then to balance the character of the evil, as well as its likelihood, against the need for free and unfettered expression." *Id.* at 435 U.S. 843, 98 S.Ct. 1543.

The case that is often cited for support of the proposition that a lawyer's comments on pending litigation may be constitutionally prohibited is *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966). Reliance is placed upon the dicta found in the closing page of that case in which the Court opined that "[c]ollaboration

between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures," 384 U.S. 363, 96 S.Ct. 1522.

The dicta first stated in *Sheppard*, and repeated to a degree in *Nebraska Press*, 427 U.S. 565, 96 S.Ct. 2805, is contradicted by the unbroken line of cases from this Court indicating the preeminent consideration that should be given to First Amendment rights. The commentary has noted that the cited dicta went far beyond what was at issue in Sheppard.

> Significantly, the references in *Sheppard v. Maxwell* to gagging the defendant and defense counsel went far beyond the appropriate scope of that opinion. The issue posed in Sheppard arose out of the "deluge" of " inherently prejudicial publicity which saturated the community", thereby depriving the defendant of due process. There was no suggestion that the defendant, Dr. Sheppard, or his lawyer created publicity that prejudiced the prosecution....
>
> Not only *Sheppard* but every other Supreme Court decision cited in the opinions in *Nebraska Press Association* involved publicity, often extremely severe, that was prejudicial to the accused, yet the Supreme Court upheld every conviction. Prior Restraints on Freedom of Expression by Defendants and Defense Attorneys: *Ratio Decidendi v. Obiter Dictum*, 29 Stan.L.R. 607, 610-11 (1977).

Despite the dicta in *Sheppard*, it seems clear that the doctrine established by this court in First Amendment cases is that a pending court case must actually be threatened, and that threat must outweigh the importance of the subject speech, before a lawyer may be punished for making pretrial communications. Rule 177, on the other hand, only requires a showing of "substantial likelihood" of prejudice to court proceedings in order to sanction an attorney for pretrial communications. It establishes a presumption of violation should one of the enumerated types of comment be made by an attorney. The Rule fails to make any inquiry into of the nature and importance of the particular communications sought to be sanctioned. As such, Amicus asserts that

Rule 177 does not comport with the doctrine refined by this Court in the cases cited above and referred to by the short-hand phrase of "clear and present danger test".

When speech is restricted because of its content, the regulation must be closely scrutinized to insure that the message is not being prohibited "merely because public officials disapprove of the speaker's views. *Niemotko v. Maryland*, 340 U.S. 268, 282, 71 S.Ct. 325, 333, 95 L.Ed. 267 (1951) (Frankfurter, J., concurring). Of paramount importance under the First Amendment is the protection of speech which pertains to public officials and governmental actions. *Mills v. Alabama*, 384 U.S. 214, 218, 86 S.Ct. 1434, 1437, 16 L.Ed.2d 484 (1966); *Bridges*, 314 U.S. 252, 289, 62 S.Ct. 190, 206; *Landmark*, 435 U.S. 829, 838-39, 98 S.Ct. 1535, 1541. Even in cases pertaining to commercial attorney speech, this Court has held the speech can only be prohibited where the State asserts a substantial interest and the interference with the speech is in proportion to the interest served. In Re R.M.J., 455 U.S. 191, 203, 102 S.Ct. 929, 937, 71 L.Ed.2d 64 (1982).

This is not a case that can merely be decided on the reasonableness of "time, place, or manner restrictions". The prohibitions enacted by Rule 177 clearly impose restrictions on what the attorney says, on the content of the speech. As this Court has explained, where the content of the message is restricted, "governmental action must be scrutinized more carefully to ensure that communication has not been prohibited 'merely because public officials disapprove the speaker's views.' " *Consol. Edison Co. v. Public Service Com'n*, 447 U.S. 530, 536, 100 S.Ct. 2326, 2332, 65 L.Ed.2d 319 (1980).

Here, the subject of the Mr. Gentile's speech was a matter of great public concern. It involved the question of whether police officers had stolen drugs and checks worth in excess of one million dollars and were trying to convict an innocent man of their own crime. Mr. Gentile's statements were brief— he generally denied his client's guilt and asserted that the more likely perpetrator was one of the police officers who had access to the safety deposit box. Trial was six months away and Mr. Gentile did not repeat his meeting with the press.

The State Bar did not present any evidence that would support the

The State Bar did not present any evidence that would support the conclusion that Mr. Gentile's statements threatened the fairness of the subsequent trial. All the Bar proved is what was conceded— Mr. Gentile made statements to the press. The Bar relied solely on the presumption contained in Rule 177 to supply the linkage between the statements made and danger to the trial.

Mr. Gentile, on the other hand, presented testimony indicating that there had been no problems associated with choosing a jury. None of the jurors knew him or knew anything of the statements he had made to the press. Furthermore, Mr. Gentile presented testimony to the effect that his statements could not have affected the fairness of the trial since the public does not absorb and remember such brief flashes of news. (App., Transcript of Disciplinary Hearing, pg. 107:12-23)

Amicus asserts that Rule 177 is facially invalid since it seeks to suppress speech without a finding that the communications threaten a substantial and imminent danger to the administration of justice. Secondly, Rule 177 was unconstitutionally applied here since the record is simply devoid of any evidence that Mr. Gentile's statements threatened the eventual trial. The State Bar, and the Nevada Supreme Court, improperly convicted the Petitioner solely based upon the presumption contained in the Rule. As such, the subject disciplinary action must be rescinded.

2. THE PRESUMPTION OF VIOLATION UTILIZED IN RULE 177 IS UNCONSTITUTIONAL IN ALL CIRCUMSTANCES AND UNCONSTITUTIONAL AS APPLIED BELOW.

Amicus asserts that it is improper under First Amendment precepts to presume that a given communication is improper. As the Court has repeatedly emphasized, determination of whether the Government may constitutionally suppress speech, or punish the prior exercise of free speech, depends on a balancing of the interests presented. In the instant context, it is necessary to weigh the importance of Mr. Gentile's communication of his concerns that police officers had stolen the drugs and money, and were trying to convict an innocent man for their own crimes, against any actual danger to a fair trial that might result. No such balancing is required by Rule 177 and none was conducted here—either by the Disciplinary Board or the Nevada Supreme Court.

As demonstrated by a review of the record of the Disciplinary Hearing, no evidence was presented by Bar Counsel concerning the effect Mr. Gentile's comments had, or might have had, on the eventual trial. All the Bar proved was that the statements had been made and that they fit within the categories of prohibited speech under Rule 177. The Nevada Supreme Court specifically found that there had been no actual prejudice to the Sanders' trial because of the comments made by Mr. Gentile. (App., Opinion, pg. 3-4) The Bar relied solely on the presumption contained in Rule 177 as proof that the subject comments had a "substantial likelihood of materially prejudicing an adjudicative proceeding" and applied that presumption as if it were irrebutable.

The fallacy of the presumption that the enumerated communications will in fact interfere with a fair trial is highlight by the evidence presented by the Petitioner at the Disciplinary Hearing. Janet Frazer Rogers, Esq. testified that a single press conference by an attorney was not likely to be recalled by a prospective witness even if that person saw the press reports. Ms. Rogers testified that there was "no probability, much less a substantial probability" that Mr. Gentile's statements would prejudice the eventual trial. (App., Disciplinary Hearing Transcript, pgs. 107:12-108:6.

Simply put, sanctioning protected speech about police criminal activity, based upon a presumption that such speech will prejudicial an important State interest, is without precedent. In all relevant situations, closing trials to the public, gag orders on the press and participants, or communications by attorneys, this Court has always required direct and substantial proof that the core interest of free speech is outweighed by the other interests involved. No such showing was made here.

Amicus asserts that the presumption of violation contained in Rule 177 operates not only to shift the burden of proof to the responding attorney, *cf. In re Rachmiel*, 449 A.2d 505, 511 fn 6 (1982), but that it has evolved in Nevada into a per se rule which effectively mandates a disciplinary conviction once it has been determined one of the enumerated classes of comment were made by an attorney during the course of litigation. This per se sanctioning has never been approved by this Court in any context pertaining to the inhibition of First Amendment rights.

3. RULE 177 IS OVERBROAD IN THAT IT REACHES SPEECH WHICH DOES NOT THREATEN THE FAIR ADMINISTRATION OF JUSTICE AND IS THEREFORE PROTECTED SPEECH UNDER THE FIRST AMENDMENT.

Rule 177 is overbroad on its face in that it reaches the exercise of free speech concerning public corruption. The Rule is not narrowly tailored to reach only that speech that creates a "clear and present danger" to the fairness of the trial process. Amicus asserts that speech concerning the guilt or innocence of a defendant, as well as speech indicating who may be truly guilty of a crime, cannot be constitutionally presumed to be prejudicial to the trial process and automatically prohibited. This is particularly true when the speech concerns possible criminal acts by public officials. Since Rule 177 does reach this type of constitutionally protected speech, it is void on overbreadth grounds.

The danger presented by overbreadth is that the particular rule will reach speech that is, in fact, protected speech. "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *Cantwell v. Connecticut*, 310 U.S. 296, 311, 60 S.Ct. 900, 906, 84 L.Ed. 1213 (1940). Here, Rule 177 prohibits all speech within the enumerated categories and presumes that such speech will interfere with the fair administration of justice. The Rule provides no balancing of the importance of the speech versus the impact on trial. As stated by this Court in *N.A.A.C.P. v. Button, supra*, 371 U.S. 415, 433, 83 S.Ct. 328, 338, 9 L.Ed.2d 405 (1963), First Amendment "freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions."

Amicus asserts that in order to avoid overbreadth problems, a valid rule concerning pretrial publicity may only prohibit speech which is either intended to, or actually does, interfere in a substantial manner with the fair administration of justice. The State Bar must present evidence showing that the subsequent trail has been affected. The Bar cannot rely upon a presumption which may or may not be true. Amicus is not aware of any case in which this Court, in First Amendment cases,

has allowed speech to be prohibited or later sanctioned based merely upon a presumption of impropriety rather than actual proof of an improper effect of the speech.

This does not mean that attorneys will feel free to say anything and everything prior to trial with the hope that the speech might influence a prospective juror. Should the trial judge experience difficulty in voir dire, or certainly should a change of venue be required, the attorney would find himself or herself in a very tenuous position. In that circumstance, should the subject speech not be of vital public importance, thereby tipping the balance back to the side of free speech, the State's interest in the administration of justice would certainly justify the imposition of appropriate disciplinary sanctions against the offending attorney.

But in the situation at bar, where no showing was ever made that the subject speech had a real danger of impacting upon the trial, and where the speech involving police criminality was at the core of First Amendment protections, there was no balancing of interests and the Rule reached speech that is protected speech. As this Court has stated, core freedoms may not be abridged "without substantial support in the record of findings of the state court." *In re Primus*, 436 U.S. 412, 434, fn 27, 98 S.Ct. 1893, 1906, 56 L.Ed.2d 417 (1978).

B. RULE 177 IS VAGUE AND THEREBY VIOLATES BOTH THE FIRST AND FIFTH AMENDMENTS.

In the First Amendment context, a disciplinary rule that is vague offends both the attorney's right to due process under the Fifth Amendment and the First Amendment's guaranty of free speech. The Due Process Clause is offended by requiring the accused to defend against a vague law that fails to give notice to a reasonable attorney of what the rule prohibits. The First Amendment is offended by the vagueness which allows the rule to reach speech which is protected. Amicus asserts that both evils are present at bar.

The First Amendment is violated by the fact that the Rule is "susceptible of sweeping and improper application." *N.A.A.C.P. v.*

Button, 371 U.S. 415, 432-33, 83 S.Ct. 328, 338. A statute, or in this case, a disciplinary regulation, which fails to give fair warning to those it purports to control is invalid under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Connally v. General Construction Co.* 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926).

The rule must be sufficiently precise so as to give persons of ordinary intelligence fair warning of what is forbidden and to avoid the possibility of arbitrary and biased prosecution. *Grayned v. City of Rockford*, 408 U.S. 104, 108-9, 92 S.Ct. 2294, 2298-99, 33 L.Ed.2d 222 (1972). This doctrine applies with full force in the context of the First Amendment. *Smith v. California*, 361 U.S. 147, 151, 80 S.Ct. 215, 217, 4 L.Ed.2d 205 (1959). The vagueness doctrine also acts to prevent "'and discriminatory enforcement . . . against particular groups deemed to merit [official] displeasure.'" *Parachristou v. City of Jacksonville*, 405 U.S. 156, 170, 92 S.Ct. 839, 847, 31 L.Ed.2d 110 (1972)(citation omitted).

Amicus asserts that the internal inconsistencies presented in Rule 177 render the Rule impermissibly vague under the Due Process Clause as well as under the First Amendment. More importantly, the Rule fails to prevent arbitrary prosecution that is based upon biased, political considerations. *Grayned v. City of Rockford*, 408 U.S. 108-9, 92 S.Ct. 2298-99. As the following demonstrates, Rule 177 contains numerous internal inconsistencies.

Subsection 2(d) of Rule 177 seeks to prevent any extrajudicial statement being made by an attorney involved in a case concerning his or her opinion of the guilt or innocence of the defendant. However, this proscription is in direct contradiction with the provisions of Subsection 3(a) which allows the attorney to make general statements dealing with the general nature of the defense, Subsection 3(b) which allows a general statement repeating information contained in a public record, and Subsection 3(c) which allows statements that an investigation is in progress, including the general scope of the investigation, the defense involved, and "the identity of the persons involved".

The internal contradiction is highlighted by the facts before the Court. Petitioner, faced with what he and his client believed to be a police coverup of their own crimes, made the general statement that his

client was innocent and that one of the Metro officers who had keys to the safe deposit box was "most likely responsible for the theft." These statements are, supposedly, in violation of Rule 177(2)(d). They are plainly allowed, however, by the provisions of Rule 177(3)(a), (b), and (c). The statements gave the general nature of the defense (Sanders was innocent). They gave information that was available or would shortly be available in the public record (Sanders' plea of not guilty and pleadings alleging that Metro officers actually stole the valuables). Finally, the statements pertain to the defense investigation of the charges, the general scope of that investigation, and the identity of those the defense actually believes committed the crime (the defense was investigating Metro's involvement in the case and the statement identifies the true perpetrators).

The Appellant also made statements concerning the background of some of the so-called victims who were expected to be witnesses. However, the Appellant carefully tailored those comments to come within the exceptions set forth under subsection (3) and refused to specifically identify any witness by name. (App., Transcript of News Conference, pg. 10:4-15)

It was the Petitioner's opinion, from his review of the Rule 177, that he could make general statements concerning his defense— someone other than Sanders had stolen the drugs and money and some of the State's witnesses were lying— but he could not identify which of the witnesses he was discussing. (App., Transcript of Disciplinary Hearing, pgs. 65-69) Amicus submits that this is not an unreasonable reading of Rule 177.

Although the Nevada Supreme Court rejected "appellant's constitutional challenges" without specific references to any of those challenges, including the vagueness argument (App., Supreme Court Opinion, pg. 4), the Court apparently was not totally unimpressed with the due process concerns expressed. On November 7, 1990, the Nevada Supreme Court amended Rule 177(1) as follows:

> 1. Notwithstanding the provisions of any contrary statute or rule, a [A] lawyer shall not make any extrajudicial statement that a reasonable person would expect to be disseminated by means of

public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceedings.

The Supreme Court has obviously sought to remove the contradictions between Subsection 2 and the provisions of subsection 3(a) which allows the attorney to make general statements dealing with the general nature of the defense, Subsection 3(b) which allows a general statement repeating information contained in a public record, and Subsection 3(c) which allows statements that an investigation is in progress, including the general scope of the investigation, the defense involved, and "the identity of the persons involved". Amicus suggests that the Nevada Supreme Court's decision to clarify Rule 177 to eliminate any internal contradictions certainly adds support to the assertion that Rule 177, as applied to the Petitioner, was vague and internally contradictory.

Since the Rule failed to adequately apprise an attorney as to what will constitute a violation, the Rule is unconstitutionally vague and in violation of the Due Process Clause. Furthermore, since the Rule failed to narrowly specify the speech to be prohibited, the Rule must also fail on First Amendment grounds.

II. RULE 177 PRESENTS A CLEAR THREAT TO AN ATTORNEY'S RIGHT TO DISCUSS MATTERS PERTAINING TO CORRUPTION AND DISHONESTY OF POLICE AND PUBLIC OFFICIALS AND TO ADEQUATELY REPRESENT HIS OR HER CLIENTS.

The Nevada Supreme Court has essentially held that an attorney forfeits the rights guaranteed under the First Amendment merely because that attorney chooses to practice law. *In re Raggio*, 87 Nev. 369, 372, 487 P.2d 499 (1971). In *Raggio*, the Court explicitly stated its disregard of free speech considerations when the speaker happens to be a member of the bar.

> Nor does free speech give a lawyer the right to openly denigrate the court in the eyes of the public. . . . A member of the bar, however, stands in a different position by reason of his oath of office and the standards of conduct which he is sworn to uphold. Conformity with those standards has proven essential to the administration of justice in our courts. Mr. Raggio offended them, and, as recommended by the Board of Governors, we reprimand him therefor. *Id.* 487 P.2d

Amicus asserts that an attorney has an obligation under the sixth Amendment to provide effective assistance of counsel in criminal proceedings. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Effective assistance of counsel means more than being counsel of record and sitting next to the defendant during trial. The defendant has a right to an attorney who will actively and aggressively pursue a defense. The Sixth Amendment envisions the attorney "playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure the trial is fair." *Id.*, 104 S.Ct. 2063.

The State Bar's application of Rule 177 prevents an attorney from freely and fully protecting a client's interest prior to trial. Here, Petitioner was faced with pervasive, prejudicial publicity leaked mainly from police officials to the effect that his client was guilty of the theft.

To ameliorate somewhat the effect of that publicity, Respondent made the simple statement that his client was innocent and named those he felt were actually guilty. To do anything less would have been a disservice to his client. To prevent the Respondent from making those comments would offend the Sixth Amendment.

Without a doubt, the main source of prejudice to the conduct of criminal trial comes from the release of information to the press, both on and off the record, by agents for the State. See A.Friendly & R. Goldfarb, Crime And Publicity: The Impact Of News On The Administration Of Justice, pg. 247 (1967)("[A]lmost all the news that plagues trials has originated in disclosures by policemen, wardens, bailiffs, coroners, or even judges. The exceptions are few."). If counsel for the accused is not allowed to attempt even faintly to counter such publicity, with the bare assertion that his client will be found innocent, an assertion that was correct herein, the scales of justice will always be balanced against the defendant.

> Indeed, circumstances will virtually never occur in which the right to freedom of speech could be more important to an individual than in the course of criminal proceedings. The prosecutor is privileged to publish to the world— including the defendant's family, friends, neighbors, and business associates— what in most any other context would constitute libel per se. The indictment may contain detailed charges of the most serious conduct, and the delay before ultimate vindication may be many months, if not years. In the meantime, entirely apart from the proceedings in court, the good name earned during a lifetime can be demolished. There can be no more pressing occasion, therefore, for immediate, effective, public rebuttal. Prior Restraints on Freedom of Expression by Defendants and Defense Attorneys, 29 Stanford Law Review 607, 613 (1977).

The claim that there is an inherent press bias against the defense was supported by the testimony presented at the hearing below.

> A. [Greenspun] Well, there's no question about it. There's an imbalance in most criminal cases.
>
> Q. What is that imbalance and how does it occur?

> A. The imbalance is the access to information. Most reporters have a far greater access to the Police Department than they have to defendants. Either defendants are told by their lawyers not to talk or the lawyers aren't talking or they can't get that kind of information from other sources and they turn around to the police. (App., Transcript of Disciplinary Hearing, pg. 106:2- 12)

> [I]f a lawyer did not do everything he could possibly do to level out the playing field of pretrial publicity, he would be derelict in his responsibility and he would not be doing or upholding his oath that says I will protect my client's rights to the fullest. (App., Transcript of Disciplinary Hearing, pg. 119: 3-8).

> [Janet Frazer Rogers, Esq.] So what are we going to do? Not cover it? All we can do is read the indictment, read the Information, talk to the police people, policemen, that's all you're going to hear. So I think that [prohibiting comments by defense counsel] doesn't only chill it. I think it produces prejudicial and slanted news coverage. (App., Transcript of Disciplinary Hearing, pg. 187:1-7)

> [Edward Kane, Esq.] The second conclusion that I've come to is if you think those statements are in violation of the rule and if you're right, then the rule is absolutely unconstitutional. The rule impedes both an attorney's right to effective assistance of counsel because again if an attorney is to do an effective job defending his client and defending him again means more than just defending him in court. It means defending him outside of court. (App., Transcript of Disciplinary Hearing, pg. 196:23-197:9)

An attorney's obligation and right to provide effective assistance of counsel is violated when the State interferes with counsel's ability to make decisions about how to conduct the defense. See, e.g., *Geders v. United States*, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976); *Herring v. New York*, 422 U.S. 853, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975). An attorney is prevented from providing effective assistance of counsel in cases where there has been pervasive and negative pretrial publicity fostered by the prosecution if that attorney is not allowed to at least

state that his client is not guilty and that the facts will prove that innocence.

The purpose of such speech is not to attempt to influence potential jurors. The purpose is to counter the effect that massive and prejudicial publicity may have on the decisions, sometimes political decisions, as to how a Defendant will be charged, tried, judged, and perhaps sentenced. District attorneys are political creatures. It has sometimes been suggested that judges are not always immune to political pressures. Since the most critical actions in a criminal case occur long before trial, countering a tide of publicity calling for the drawing and quartering of your client is an essential part of a lawyer's role in defending a client in a sensational case.

To unilaterally ban all statements by the defense attorney reflecting the client's innocence, or pointing at those believed to be the true guilty parties, prevents an attorney from protecting his client against prejudicial pretrial publicity. It leaves the defendant without anyone to speak for him. It deprives the attorney of his First Amendment right of free speech. Therefore, as set forth above, unless there is a showing made that such comments will actually prejudice the proceedings, Amicus asserts that a lawyer's right to speak out in defense of the client concerning police misconduct outweighs the marginal concern for the fair administration of justice presented here.

CONCLUSION

For the reasons set forth above, Amicus asserts that Petitioner's First and Fifth Amendment rights were violated by Rule 177. The Rule is unconstitutional on its face and as applied. Affirmance of the Nevada Supreme Court's actions will have a profoundly chilling effect on defense counsel's willingness to respond to the challenge of major criminal trials. Such an effect is hardly warranted given the lack of proof of any real danger to the administration of justice by the exercise of free speech by defense attorneys. Finally, upholding the Nevada Supreme Court's determination that one press conference presents a substantial likelihood of prejudicing an eventual trial may have extremely interesting consequences on fair trial claims under the Sixth Amendment. For all these reasons, Amicus asserts that the instant disciplinary charges should be stricken.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that I am an employee of KEVIN M. KELLY, LTD. and that I am not a party to nor interested in the within action; on the _____ day of February, 1991, I deposited three (3) true and correct copies of the BRIEF OF AMICUS CURIAE in the United States mails, first class postage prepaid thereon, addressed to the following:

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